MKP Capital Bhd v WLS (Oversea Projects) Ltd

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22NCC-318 OF 2010
HASNAH MOHAMMED HASHIM J
4 MAY 2012

Civil Procedure — Jurisdiction — Court — Refund of deposit — Defendant obtained judgment against plaintiff in the High Court of Hong Kong — Judgment subsequently registered in High Court of Malaya — Plaintiff's application to set aside registration was dismissed by High Court and Court of Appeal — Whether High Court of Malaya had jurisdiction to determine dispute between plaintiff and defendant pursuant to cl 7.8 of the framework agreement — Courts of Judicature Act 1964 s 23(1)

Contract — Agreement — Construction of — Terms and conditions of the agreement — Framework agreement and authorised distributor agreement — Deposit to be refunded when total quantity of granite blocks supplied less than 750 cubic meter — Defendant alleged granite blocks supplied by plaintiff was less than 750 cubic meters — Whether agreements clear and unambiguous — Whether there were any inconsistencies between cll 3.5–3.6 — Whether deposit refundable immediately due to the above event without any deductions or set off

The plaintiff and the defendant, a joint venture company incorporated in Hong Kong, entered into an MOU to set up a joint venture investment company on a 50%-50% basis to invest in property development and natural resources exploitation in the Republic of Angola. The principal object of the joint venture company was to operate and extract granites from the Republic of Angola. The plaintiff and the defendant entered into two agreements known as: (a) framework agreement ('FA'); and (b) authorised distributor agreement. The defendant was given an option to purchase the granite mines and also to act as exclusive distributor of MKP Capital Bhd under the FA. Clause 3.6 of the authorised distributor agreement provided that the deposit shall be refunded to the defendant as distributer in the following event: (i) the total quantity of the granite blocks supplied by the plaintiff in the first three months from the date hereof was less than 750 cubic meter or; (ii) the exploitation rights granted to the plaintiff under the mining contract was revoked during the three month period. The defendant contended that the granite blocks supplied by the plaintiff was less than 750 cubic meters and therefore sought a refund pursuant to the said clause. The plaintiff however, contended that the defendant was not entitled to the refund of deposit as cl 3.6 was inconsistent with cl 3.5. Earlier, the defendant had commenced an action in the Hong Kong High Court for the

refund of the deposit. As the plaintiff had failed to put in his defence, the defendant obtained a final judgment. Subsequently, the said judgment was registered in the High Court of Malaya. The plaintiff's application to set aside the registration was dismissed by both the High Court and the Court of Appeal. Hence, in this application, the plaintiff was seeking the determination of this court on the following questions: (a) whether the High Court of Malaya at Kuala Lumpur had the jurisdiction to determine the dispute between the plaintiff and the defendant pursuant to s 23(1) of the Courts of Judicature Act 1964 ('CJA') by reason of cl 7.8 of the FA; and (b) whether pursuant to cl 3.5 of the authorised distributor agreement, the deposit sum of US$400,000 paid to plaintiff for defendants' purchase of 'granite blocks' were to be applied as follows: (i) for plaintiffs 'purchase of plant machinery and equipment for the exploitation of the granite mines and for operating costs incurred therefrom': (ii) or as payment for defendant's option to purchase the granite mines as stated in cll 3.7– 3.8 of the authorised distributor agreement and read together with cl 4.1 of the FA, whichever comes first.

Held, dismissing the application with costs:

(1) Applying s 23(1) of the CJA and cl 7.8, this court had the jurisdiction to determine the dispute between the parties but the laws of Hong Kong will apply as agreed by the parties under the agreement. The issue on jurisdiction had also been determined by the Court of Appeal (see para 19).

(2) The terms and conditions of the agreement were clear and unambiguous and there are no inconsistencies between cll 3.5–3.6. Clause 3.5 provides that a payment of deposit of USD400,000 must be made by the defendant as the agreement states, '… The deposit shall be in turn be applied by MKP for the purchase of plant, machinery and equipment for exploitation of the Granite Mine and for the operating cost incurred therefrom'. However, the agreement did not state that any sum expended for the purchase of plant, machinery and equipment for exploitation of the granite mine shall be regarded as a set off in the event the deposit becomes refundable (see paras 20–21).

(3) Clause 3.6 provides clearly that upon the occurrence of either one of the events that is, (i) the total quantity of the granite blocks supplied by the plaintiff in the first three months from the date hereof is less than 750 cubic meters or; (ii) the exploitation rights granted to the plaintiff under the mining contract is revoked during the three month period, the deposit '… of USD400,000 shall immediately be refundable to the Distributer …'. Therefore, if any one of the above events occur, then the deposit of USD400,000 shall be immediately refundable without any deductions or set off. As in this case, since the total quantity of the granite

blocks was less than 750 cubic meters, the plaintiff was under obligation to refund the deposit of USD400,000 to the defendant (see para 21).

[Bahasa Malaysia summary

Plaintif dan defendan, sebuah syarikat usaha sama yang ditubuhkan di Hong Kong, memasuki satu MOU untuk menubuhkan sebuah syarikat pelaburan usaha sama atas dasar 50%-50% untuk melabur di dalam pembangunan hartanah dan exploitasi sumber-sumber asli di Republik Angola. Tujuan utama syarikat usaha sama tersebut adalah untuk mengendalikan dan mengeluarkan batu-batu granit dari Republic Angola. Plaintif dan defendan memasuki dua perjanjian yang dikenali sebagai: (a) perjanjian rangka kerja ('PR'); dan (b) perjanjian pengedar sah. Defendan diberikan pilihan untuk membeli lombong granit dan juga untuk bertindak sebagai pengedar eksklusif MKP Capital Bhd di bawah FA. Klausa 3.6 perjanjian pengedar sah memperuntukkan bahawa deposit akan dikembalikan kepada defendan sebagai pengedar atas kejadian berikut: (i) jumlah keseluruhan blok-blok granit yang dibekalkan oleh plaintif dalam tiga bulan pertama dari tarikh ini adalah kurang dari 750 meter padu atau; (ii) hak eksploitasi yang diberikan kepada plaintif di bawah kontrak perlombongan dibatalkan dalam tempoh tiga bulan. Defendan menghujahkan bahawa blok-blok granit yang dibekalkan oleh plaintif adalah kurang daripada 750 meter padu dan dengan itu memohon pemulangan berikutan klausa tersebut. Plaintif walau bagaimanapun, menghujah bahawa defendan tidak berhak untuk pemulangan deposit kerana klausa 3.6 tidak konsisten dengan klausa 3.5. Sebelumnya, defendan telah memulakan tindakan di Mahkamah Tinggi Hong Kong untuk pemulangan deposit tersebut. Oleh sebab plaintif telah gagal membela diri, defendan memperoleh penghakiman muktamad. Kemudian, penghakiman tersebut didaftarkan di Mahkamah Tinggi Malaya. Permohonan plaintif untuk mengetepikan pendaftaran ditolak oleh kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan. Maka dalam permohonan ini, plaintif memohon pertimbangan mahkamah atas persoalan-persoalan berikut: (a) sama ada Mahkamah Tinggi Malaya mempunyai bidang kuasa untuk menentukan pertikaian antara plaintif dan defendan berikutan s 23(1) Akta Mahkamah Kehakiman 1964 ('AMK') atas alasan klausa 7.8 PR; dan (b) sama ada berikutan klausa 3.5 perjanjian pengedar sah, jumlah deposit sebanyak US$400,000 yang dibayar kepada plaintif untuk defendan-defendan membeli 'granite blocks' adalah untuk digunakan seperti berikut: (i) 'purchase of plant machinery and equipment for the exploitation of the granite mines and for operating costs incurred therefrom' oleh plaintif; (ii) atau sebagai bayaran untuk pilihan defendan membeli lombong granit seperti yang dinyatakan di dalam klausa-klausa 3.7–3.8 perjanjian pengedar sah dan dibaca bersama dengan klausa 4.1 PR, yang mana dahulu.

Diputuskan, menolak permohonan dengan kos:

(1) Mengaplikasikan s 23(1) AMK dan klausa 7.8, mahkamah ini

mempunyai bidang kuasa untuk menentukan pertikaian antara pihak-pihak tetapi undang-undang Hong Kong akan terpakai seperti yang dipersetujui oleh pihak-pihak di bawah perjanjian. Isu bidang kuasa juga telah diputuskan oleh Mahkamah Rayuan (lihat perenggan 9).

(2) Terma-terma dan syarat-syarat perjanjian adalah jelas dan terang dan ketidakselarasan di antara klausa 3.5–3.6. Klausa 3.5 memperuntukkan bahawa bayaran deposit sebanyak USD400,00 mesti dibuat kepada defendan kerana perjanjian menyatakan, '… The deposit shall be in turn be applied by MKP for the purchase of plant, machinery and equipment for exploitation of the Granite Mine and for the operating cost incurred therefrom'. Walau bagaimanapun, perjanjian tersebut tidak menyatakan bahawa apa-apa jumlah yang dibelanjakan bagi pembelian loji, mesin dan perkakas bagi eksploitasi lombong granit mesti dianggap sebagai *set off* jika deposit menjadi tidak boleh dikembalikan (lihat perenggan 20–21).

(3) Klausa 3.6 memperuntukkan secara jelas bahawa jika berlaku salah satu daripada perkara iaitu, (i) jumlah keseluruhan blok granit yang dibekalkan oleh plaintif dalam tempoh tiga bulan pertama dari tarikh di sini adalah kurang daripada 750 meter padu; atau (ii) hak eksploitasi diberikan kepada plaintif di bawah kontrak perlombongan adalah dibatalkan dalam tempoh tiga bulan, deposit '… of USD400,000 shall immediately be refundable to the Distributer …'. Oleh demikian, jika salah satu daripada perkara di atas berlaku, maka deposit USD400,000 mesti dikembalikan dengan segera tanpa apa-apa pemotongan atau *set off*. Seperti dalam kes ini, oleh sebab kuantiti blok-blok granit adalah kurang daripada 750 meter padu, plaintif bertanggungjawab memulangkan deposit USD400,000 kepada defendan (lihat perenggan 21).]

Notes

For a case on construction of, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 2815.

For cases on court, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5176–5185.

Legislation referred to

Courts of Judicature Act 1964 ss 23, 23(1)(a), (b), (c), (d), 23(2)

Jeffery Ling (KC Tang and Mohammad Shafiee with him) (KC Tang & Co) for the plaintiff/appellant.

Vinodhini Samuel (Joseph & Partners) for the defendant/respondent.

Hasnah Mohammed Hashim J:

THE CLAIM

[1] The plaintiff seeks the determination of the court on the following questions namely:

(a) that the High Court of Malaya at Kuala Lumpur has jurisdiction to determine this dispute between the plaintiff/MKP Capital Bhd and defendant/WLS (Oversea Projects) Ltd pursuant to s 23(1) of the Courts of Judicature Act ('CJA') by reason of cl 7.8 of the framework agreement dated 28 March 2008;

(b) upon the true construction of cl 3.5 of the authorised distributor agreement dated 28 March 2008, the deposit sum of US$400,000 paid to the plaintiff for the defendants' purchase of 'granite blocks' are to be applied as follows:

(i) for 'the plaintiff's purchase of plant, machinery and equipment for the exploitation of the granite mine and for operating costs incurred therefrom';

(ii) or as payment for the defendant's option to purchase the granite mines as stated in cll 3.7–3.8 of the authorised distributor agreement and read together with cl 4.1 of the framework agreement, whichever comes first.

(c) for an order that:

(i) upon the true construction of cl 3.5 of the authorised distributor agreement, an account stated be rendered by plaintiff to defendant for the purchase of plant, machineries, equipment and operating costs incurred in the exploitation of the granite mines. Annex hereto as Schedule 1;

(ii) a set-off on the account stated against the deposit sum of US$400,000;

(iii) an order for payment of balance sums due and owing after set-off against defendant upon an account stated rendered and certified by the court before the senior assistant registrar on a date to be fixed by the court herein.

(d) alternatively, upon the true construction of cl 3.5 of authorised distributor agreement, that upon an account stated rendered by plaintiff on the said deposit to 'purchase of plant, machinery and equipment for

the exploitation of the granite mine and for operating costs incurred therefrom', the defendant's right to a refund of deposit on any of the two events as stated in cl 3.6 is inconsistent, contradictory and/or repugnant to cl 3.5 and is therefore redundant;

(e) cost of this action; and

(f) such other relief as the honourable court deem fit and proper.

BACKGROUND

[2] MKP Capital Bhd ('the plaintiff') and WLS Holdings Ltd ('the defendant') entered into an MOU dated 9 December 1997 to set up a joint venture investment company on a 50%–50% basis to invest in property development and natural resources exploitation in the Republic of Angola. A joint venture company known as WLS (Oversea Projects) Ltd (ie the defendant) was incorporated in Hong Kong with the shareholders as follows:

(a) the plaintiff — 50%; and

(b) Wui Loong Consultancy Ltd — 50%.

[3] The authorised capital of the joint venture company (the defendant) is HK$400,000 fully paid as follows:

(a) the plaintiff — HK$200,000; and

(b) Wui Loong Consultancy Ltd — HK$200,000.

[4] The principal objects of the joint venture company is to operate and extract granites from Republic of Angola.

[5] Pursuant to cl 2 of the MOU, the operating cost and expenses by the joint venture company shall be on a pro-rata of shareholding ie 50%–50% basis. The plaintiff and the defendant then entered into two agreements known as:

(a) framework agreement dated 28 March 2008; and

(b) authorised distributor agreement on 28 March 2008.

[6] The defendant was also given an option to purchase the granite mines and also to act as exclusive distributor of MKP Capital Bhd under the FA.

Whether the High Court of Malaya at Kuala Lumpur has jurisdiction to determine this dispute between the plaintiff/MKP Capital Bhd and the defendant/WLS (Oversea Projects) Ltd Pursuant to s 23(1) of the Courts Of Judicature Act (CJA) by reason of cl 7.8 of the framework agreement dated 28 March 2008

[7] Section 23 of the CJA provides as follows:

(1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where — A

(a) the cause of action arose;

(b) the defendant or one of several defendants resides or has his place of business; B

(c) the facts on which the proceedings are based exist or are alleged to have occurred; or

(d) any land the ownership of which is disputed is situated,

within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court. C

(2) Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction. D

[8] Clause 7.8 of the framework agreement reads as follows:

This Framework agreement shall be governed by and construed in accordance with the laws of Hong Kong and the parties hereby submit to the non-exclusive jurisdiction of the courts of Hong Kong in relation to any claim or dispute which may arise hereunder. E

[9] Applying s 23(1) of the CJA and cl 7.8 this court has jurisdiction to determine the dispute between the parties but the laws of Hong Kong will apply as agreed by the parties under the agreement. The issue on jurisdiction has also been determined by the Court of Appeal. F

Whether pursuant cl 3.5 of the authorised distributor agreement dated 28 March 2008. The deposit sum of US$400,000 paid to the plaintiff for the defendants' purchase of 'granite blocks' are to be applied as follows: G

(a) for the plaintiffs 'purchase of plant machinery and equipment for the exploitation of the Granite Mine and for operating costs incurred therefrom'; and H

(b) or as payment for defendant's option to purchase the granite mines as stated in cll 3.7–3.8 of the authorised distributor agreement and read together with cl 4.1 of the framework agreement, whichever comes first. I

[10] It is noted that the defendant had commenced an action in the High Court of Hong Kong for the refund of the deposit and the writ was duly served on the plaintiff. The plaintiff entered appearance according to Hong Kong

rules and procedure. However no defence was filed by the plaintiff neither did the plaintiff set aside or apply to strike out the writ. As no defence was filed by the plaintiff as defendant the defendant obtained a final judgment against the plaintiff on 8 February 2010 for the sum of USD400,000 together with interest and fixed cost. The said judgment was subsequently registered as a judgment in the High Court of Malaya on 10 January 2011. The plaintiff applied to set aside the registration but its application was dismissed on 5 May 2011 and on appeal the Court of Appeal dismissed the plaintiff's appeal on 24 August 2011.

[11] Clause 3.5 of the authorised distributer agreement reads:

> The Distributer shall pay USD400,000.00 as deposit for the purchase of the Granite Blocks from the Company within 30 days of the execution of this Agreement or 14 days from the date of drawdown of the loan granted by WLS Holding Limited to the Distributer under a facility letter of even date, whichever is the later. The deposit shall be in turn be applied by MKP for the purchase of plant, machinery and equipment for exploitation of the Granite Mine and for the operating cost incurred there from. The deposit of RM400,000.00 shall not bear any interest.

[12] The 'distributer' under the said agreement refers to the defendant and the purpose of the agreement is the appointment of the defendants the exclusive distributer promoting the sale of the granite blocks. The plaintiff under the agreement (cl 5.1) has the exploitation rights in respect of the granite mines granted under mining exploitation contract. Clause 5.2 further provides that the plaintiff shall use its best efforts to supply at least the minimum quantity as set out under cl 3.4 of the agreement.

[13] Clause 3.6 of the same agreement provides that the deposit shall be refunded to the defendant as distributer in the event:

(a) the total quantity of the granite blocks supplied by the plaintiff in the first there months from the date hereof is less than 750 cubic meter or;

(b) the exploitation rights granted to the plaintiff under the mining contract is revoked during the three month period.

[14] Clause 3.7 provides that the if option is exercised by the distributer within two years form the date of the agreement the distributer shall have the right to apply for the deposit of RM400,000 as mentioned in cl 3.5 if it has not been refunded under cl 3.6.

[15] The term 'Option' referred in cl 3.7 is defined as:

> … An option of acquiring the exploitation rights in respect of the Granite Mines granted to the Company under the Mining exploitation Contract ….

[16] The defendant contends that the granite blocks supplied by the plaintiff was less than 750 cubic meters and therefore sought a refund under cl 3.6. The plaintiff contends that the defendant is not entitled to the refund of deposit as cl 3.6 is inconsistent with cl 3.5. The plaintiff further contends that the amount incurred by the plaintiff as a result of the joint venture is US1,177,853 for the purchase of plants, machinery and equipment as well s operating cost. Therefore there is no refund.

[17] Learned counsel for the plaintiff submits that the cl 3.6 contradicts cl 3.5 and is repugnant. He referred to Kim Lewison's 'Interpretation of Contacts' (para 8.08 at p 199) where the author states that:

> If a clause in a contract is followed by a later clause which destroys the effect of the first clause, the later clause is to be rejected on repugnant and the earlier clause prevails ….

[18] The counsel further submits that there is nothing to refund and cl 3.6 is redundant and inconsistent with cl 3.5. The defendant is therefore estopped form claiming a refund having expressly agreed to the application of the deposit sum by the plaintiff to purchase plant, machinery and equipment.

[19] Learned counsel for the defendant submits that cl 3.6 unequivocally provide that the deposit be refunded upon the breach. She further submits that the terms must be construed based on the its ordinary and literal meaning. It is submitted that the meaning to be put on contract is that what is plain, clear and obvious (*Re Chitty on Contracts* Vol 1, General Principles; (26th Ed)) The terms of the agreement are clear and simple. The wordings of the said clauses and the factual matrix of the case does not give rise to any suggestion that the defendant is to bear or share the operational cost and expenses.

[20] I am in agreement with learned counsel for the defendant that the terms and conditions of the agreement are clear and unambiguous. I am therefore of the view that there is no inconsistency between cll 3.5–3.6. Clause 3.5 provides that a payment of deposit of USD400,000 must be made by the defendant and it went on to say that:

> … The deposit shall be in turn be applied by MKP for the purchase of plant, machinery and equipment for exploitation of the Granite Mine and for the operating cost incurred therefrom.

[21] However, it did not state that any sum expended for the for the purchase

of plant, machinery and equipment for exploitation of the granite mine shall be regarded as a set off in the event the deposit becomes refundable. Clause 3.6 provides clearly that upon the occurrence of either one of the events that is:

(a) the total quantity of the granite blocks supplied by the plaintiff in the first there months from the date hereof is less than 750 cubic meters or;

(b) the exploitation rights granted to the plaintiff under the mining contract is revoked during the three month period,

the deposit '… of USD400,000 shall immediately be refundable to the Distributer …'. Therefore if any one of the above events occur then the deposit of USD400,000 shall be immediately refundable without any deductions or set off. Since the total quantity of the granite blocks is less than 750 cubic meters, the plaintiff is under obligation to refund the deposit of USD400,000 to the defendant.

[22] Based on the reasons mentioned above encl 1 is dismissed with cost.

Application dismissed with costs.

Reported by Ashgar Ali Ali Mohamed